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March 8, 2002

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VIA HAND DELIVERY

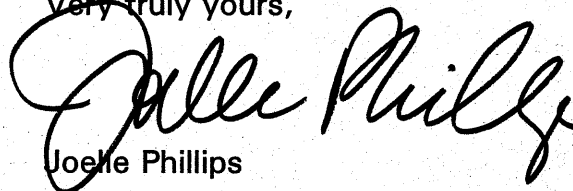
David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition of Tennessee UNE-P Coalition to Open a Contested Case
Proceeding to Declare Switching an Unrestricted Unbundled Network
Element*
Docket No. 02-00207

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Motion for Leave to Reply to the Coalition's Opposition to Motion to Dismiss, including BellSouth's proposed Reply. Copies of the enclosed are being provided to counsel of record.

Very truly yours,



Joelle Phillips

JJP:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of Tennessee UNE-P Coalition to Open a Contested Case
Proceeding to Declare Switching an Unrestricted Unbundled Network
Element*

Docket No. 02-00207

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR LEAVE TO FILE REPLY

BellSouth Telecommunications, Inc. ("BellSouth") respectfully moves the Tennessee Regulatory Authority ("Authority") for leave to file a Reply to Petitioner's "Opposition to BellSouth's Motion to Dismiss". A copy of BellSouth's proposed Reply is attached as Exhibit A.

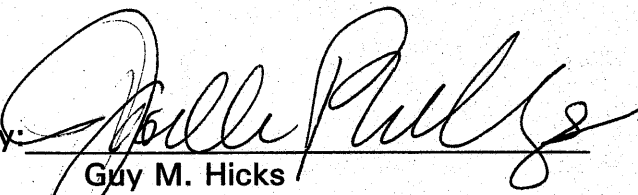
As grounds for this Motion, BellSouth states that, in their Opposition to BellSouth's Motion, Petitioners have changed their position regarding the basis for expedited treatment of their claim and mischaracterized the nature of the FCC's earlier ruling on the issues presented in the Petition. Accordingly, good cause exists to allow BellSouth the opportunity to respond to Petitioners' new assertions and to cite to the FCC record on this issue. BellSouth has attempted to provide a seven-page, targeted response addressing only those issues that BellSouth believes constitute new or changed arguments raised in the Opposition to the Motion to Dismiss. The Authority should have the benefit all relevant information that bears on the issues presented in the Petition. Moreover, BellSouth believes that specific

record cites to the earlier FCC proceeding may assist the Authority to review the Petition.

For the foregoing reasons, BellSouth respectfully requests that the Authority grant BellSouth leave to file the proposed Reply.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 
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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Switching an Unrestricted Unbundled Network Element*

Docket No. 02-00207

REPLY TO OPPOSITION TO BELLSOUTH'S
MOTION TO DISMISS

BellSouth Telecommunications, Inc. ("BellSouth") files this Reply to the Opposition to BellSouth's Motion to Dismiss filed by Petitioners in the above-referenced docket and respectfully shows the Authority as follows.

I. PETITIONERS' ASSERTION OF THE SIGNIFICANCE OF THIS ISSUE IS NOT RECONCILABLE WITH THEIR FAILURE TO RAISE THE ISSUE IN THE SEVERAL YEARS SINCE THE FCC EXCEPTION WAS ESTABLISHED.

In their original petition, the Petitioners in this matter urged the Authority to proceed under an expedited procedural process solely on the basis of a statutory right to such schedule. Counsel for the Petitioners orally clarified at the Agenda Conference on February 26 that it was the application of that statute, and not the existence of any emergency, which the Petitioners believe mandated expedited treatment of their claim. Both in the Motion to Set Pre-Hearing Conference and in the Opposition to BellSouth's Motion to Dismiss, the Petitioners now appear to be taking a different position.

In the more recent filing by Petitioners, rather than relying on a statutory basis for expedited treatment of the claims, the Petitioners instead seem to rely on the purported significance of the issue raised by their claim. Characterizing that issue as "central to the future of competition in the state," the Petitioners urge the Authority to take up their claim on an expedited basis. While the words in the Opposition to BellSouth's Motion to Dismiss present an impassioned plea for the Authority to treat the claims as vitally important to the petitioning CLECs, the actions of those CLECs would seem to indicate a very different perspective. The FCC exception that Petitioners attempt to assail with their claims has been in effect since 1999. In the several years since that FCC ruling, the Petitioners who now argue that this issue is central to the future of competition in this state, have never raised that issue in the Tennessee UNE docket or in the hundreds of arbitration issues¹ brought before the Tennessee Regulatory Authority during that time. Similarly, the petitioning CLECs, who argue that the TRA has authority under state law to alter this FCC-imposed exception to TELRIC pricing for UNE-P, for some reason have never before sought to convene a case to address this supposed pivotal issue. Petitioners would have the Authority believe that, suddenly on the eve of the last Agenda Conference, this issue become an emergency, the resolution of which is key to competition in this state. BellSouth respectfully suggests that such a scenario is implausible. Rather, it is more likely that Petitioners recognize

¹ For example, in the recent AT&T arbitration, the TRA ruled regarding the method to count lines of a single customer for purposes of precisely the FCC exception challenged by the Petitioners in this docket. No party challenged that arbitration ruling on the basis of the arguments advanced by Petitioners in this docket.

the unlikelihood that the FCC will reverse its exception at its upcoming triennial review and instead hope to find a state regulatory agency willing to enter an order contradicting the FCC exception, which the Petitioners could then use to bolster their argument in the upcoming triennial review.

II. THE FCC HAS ALREADY CONSIDERED AND REJECTED THE ARGUMENTS RAISED BY PETITIONERS.

Most importantly, the Opposition to BellSouth's Motion to Dismiss incorrectly suggests that the arguments made in that Opposition are in some way new arguments, not already considered by the FCC in addressing this same issue. That is simply not the case. As noted in more detail below, the FCC has considered the evidence and arguments suggested or alluded to by the Petitioners in their Opposition to the Motion to Dismiss. The FCC rejected those arguments when it ruled that the exception to circuit switching was required under the necessary-and-impair standard. The Petitioners concede that this is the proper standard for the TRA to use, but fail to note that the FCC, using the same standard and considering the same arguments, has reached a conclusion different than the conclusion the Petitioners seek from the TRA.

Where the FCC has already undertaken an impairment analysis under 251(d)(2), the state is prevented from undertaking an inconsistent impairment analysis by the terms of 251(d)(3)(B). With respect to the specific UNE of circuit switching, the FCC conducted two separate impairment analyses. First, in 1996, the FCC found circuit switching to be a UNE under the FCC's necessary-and-impair

standard. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499 (1996). Then in 1999, the FCC, applying the necessary-and-impair standard as clarified by the United States Supreme Court, specifically carved out the exception to the UNE at issue in this docket. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999), ¶¶ 276-299. Considering the same evidence and arguments raised in the Opposition, the FCC ruled the CLECs were not impaired without access to that UNE under those circumstances. Specific data about the Nashville MSA was included in the FCC record in the context of the FCC's circuit switching unbundling analysis. *See Huber and Leo, UNE Fact Report*, May 26, 1999, at I-11, Table 2; I-22, Table 4 (attachment to USTA Comments dated May 26, 1999) (BellSouth will provide copies upon request). The record before the FCC contained specific evidence regarding loops and ports provided by BellSouth in Tennessee, demonstrating that in Tennessee CLECs have collocated in BellSouth's Central Offices and have chosen to send their loop traffic to their own switches rather than to BellSouth's. *See BellSouth's Comments* at 60 (May 26, 1999) (BellSouth will provide copies upon request). Based on overwhelming evidence, which evidence included data specific to Nashville and Tennessee, the FCC made a specific finding that

requesting carriers are not impaired without access to local switching in Zone Density 1 top 50 MSAs, including Nashville.

Having already considered the same issue and the same evidence on this issue, the FCC's determination is binding. Any state commission finding to the contrary would be unlawful under Section 251(d)(3) because it would not be "consistent with the requirements" of that section as set forth in the impairment finding already made by the FCC under 251(d)(2).

The Petitioners' argument with respect to frame relay is misleading. Unlike circuit switching, the FCC did not undertake an impairment analysis of the frame relay network element. The FCC refused to even consider it because defining packet switching in terms of a particular technology such as frame relay violates the FCC's principles of UNE technological neutrality. The FCC further had no information on which to even conduct that impairment analysis. The Petitioners' selective quotation on this issue is misleading in that it omits the following sentence from the text block quoted on page 5 of the Opposition. "Second, e.spire/Intermedia have not provided any specific information to support a finding that requesting carriers are impaired without access to unbundled frame relay." *Third Report and Order* at ¶ 312. Accordingly, the FCC had never considered impairment with respect to the frame relay network element, and any state finding regarding that UNE could not possibly be inconsistent with an FCC finding, because there was no such finding. The reason the FCC noted that states were free to decide the issue on frame relay was because the FCC did not conduct an

impairment analysis with which such a state finding could be inconsistent. Accordingly, the Petitioners' attempt to equate the frame relay issue with the circuit switching issue is inconsistent with the FCC record on that matter. Moreover, none of the cases cited by Petitioners provide an example of a state agency ruling that was inconsistent with a prior FCC ruling.

III. CONCLUSION

The Opposition to BellSouth's Motion to Dismiss creates two inaccurate perceptions. First, Petitioners attempt to suggest that this issue is an emergency with grave consequences to competition in Tennessee. That suggestion is inconsistent with the Petitioners' own failure to raise this issue for years after the FCC announced the exception which the Petitioners seek to avoid. Second, Petitioners seek to create the incorrect perception that a TRA ruling in their favor could be consistent with the FCC's ruling and federal law. As discussed above, the FCC has already considered precisely the arguments advanced in this Petition. The Petitioners themselves concede that the same analysis undertaken by the FCC would be required if the TRA were to consider the issue. Yet, Petitioners seek to have the TRA impose the same standard on the same issue, considering the same evidence as the FCC – but reach a different result. Such an outcome would violate 251(d)(3). Put another way, the Petitioners couch their claim as if they are asking the TRA to do something that the FCC has not yet done – to add a UNE. However, what they really seek is for the TRA to enter an order contradicting and

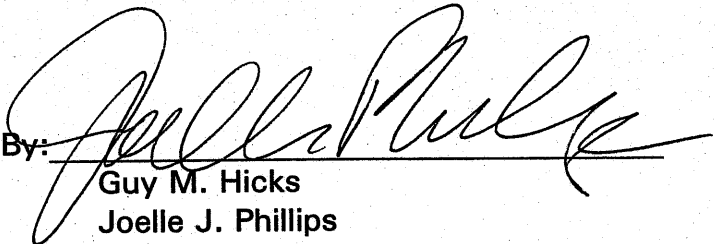
rejecting the FCC finding that CLECs are not impaired without circuit switching under the circumstances set forth in the FCC exception.

The FCC's triennial review is the proper place for the CLECs to present the arguments raised herein, namely that the FCC should reverse itself on this issue.

For the foregoing reasons and those reasons set forth in BellSouth's earlier pleading, BellSouth respectfully requests that the Authority enter an order dismissing the Petition.

Respectfully submitted,

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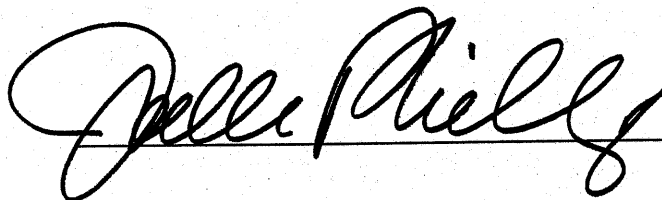
Atlanta, GA 30375

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2002, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

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Boult, Cummings, et al.
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A handwritten signature in cursive script, reading "John P. Kelly", is written over a horizontal line.